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Supreme Court of the United States

OCTOBER TERM, 1905.

No. 553.

ROBERT SAWYER AND ARTHUR ADAMS,

PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

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ROBERT SAWYER AND ARTHUR ADAMS.

SUPREME COURT OF THE UNITED STATES.

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STATEMENT OF THE CASE.

The schooner "Harry A. Berwind" sailed from Philadelphia on the 6th day of July, A. D., 1905, bound for Cardenas, Cuba. Her destination was first to Cardenas, thence to Mobile, Alabama; thence to Philadelphia. She had on board upon leaving Philadelphia, outward bound, a captain, E. R. Rummill; John Hall, mate; C. L. Smith, engineer; John Falbe, cook, all white men; and four seamen—Henry Scott, Arthur Adams, the Defendant; Robert Sawyer, the defendant, and one John S. Coakley, all negroes.

The schooner left Cardenas with all aboard, and arrived at Mobile. She left Mobile with all aboard September 23d, 1905, for Philadelphia, with a load of lumber under and on deck.

The vessel proceeded on her course after leaving Mobile toward her port of destination. On October 6th, in a squall, the topsail was lost, and on October 8th the vessel ran into a gale and carried away her rudder post. In this gale she sprung a leak and her pumps were thereafter kept continuously going.

On the night of October 10th, about 9 o'clock in the evening, the lookout on the American schooner "Blanche

H. King," reported a vessel ahead right in her course, carrying a red light in the upper rigging, and at times bearing across the course of the "Blanche H. King". The Captain of the "Blanche H. King" hailed the vessel, which proved to be the American schooner "Harry A. Berwind." As the "Blanche H. King" drew nearer the other vessel, Captain Taylor of the "King" hailed and asked what was the matter, and the reply came back from the "Berwind" that a man aboard had killed the captain, mate, engineer, steward, and had just killed a sailor. The captain of the "King" then asked what was wanted, to which the voice replied they wanted to be taken off. A boat from the "King" was sent alongside, and after some parleying Adams, the defendant, Sawyer, the defendant, and one Henry Scott were found to be all that were alive aboard, and were taken into the boat and carried to the "Blanche H. King". Scott was found aboard the "Harry A. Berwind", tied on the cabin house, and he was pointed out by Adams, the defendant, and Sawyer, the defendant, as the person who killed the captain, mate, engineer, cook and the seaman still aboard. The three men, Scott, Adams, the defendant, and Sawyer, the defendant, were then taken aboard the "Blanche H. King" and put in irons, and put down in the lazarette.

The "Harry A. Berwind" was placed in the hands of a prize crew, and both vessels were brought into Southport, North Carolina. The body of the dead sailor, Coakley, was still aboard when the "Berwind" reached Southport. nothing was seen of either the captain, the mate, the engineer and the cook of the "Harry A. Berwind" at the time she was boarded by the members of the crew of the "Blanche H. King" or afterwards.

In the United States District Court for the Eastern District of North Carolina, on the 1st day of November, 1905,

the grand jury returned an indictment against Arthur Adams and Robert Sawyer for the murders of E. R. Rummill, John Hall, C. L. Smith, John L. Falbe, and John S. Coakley on the 28th day of October, A. D., 1905, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of said court in and on board of a certain vessel of the United States of America, to wit, the schooner called the "Harry A. Berwind".

On the 4th day of November, 1905, when the jury empanelled for the trial of Adams and Sawyer were out, a bill of indictment was returned against Henry Scott for the murder of the same people.

In the venire so drawn many were summoned by telegram or telephone, and only a part of the special venire—to wit, 39 of the venire—appeared. The United States marshal, in open court, in the presence of the defendants, making the statement that summons had been made by telegram or telephone. The marshal made formal return of the writ.

While the jury was being empanelled on the trial of Arthur Adams and Robert Sawyer, several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause or to peremptorily challenge any and all of said jurors so stood aside.

To each and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the State practice would be followed, and there was no United States Statutes on the subject; to which ruling of

the court the defendants then and there duly excepted. It appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empanelled.

After the jury was empanelled the defendants challenged the array, assigning as grounds for challenge that the special venire of fifty summoned in the case, of which there had been accepted by defendants and were on the jury as empanelled, to wit, M. N. Caddell, R. I. Durham, and H. W. Hood, had been and were improperly summoned, the summons having been made on them by telegram or telephone, the admission as to the method of summoning them being made in open court by the United States marshal, but there was no evidence as to how the three persons aforesaid were summoned, except as appeared in the writ. But the court overruled the said challenge, and to this ruling of the court the defendants, by their counsel, duly excepted.

The only witness introduced by the Government testifying as to the killing was Henry Scott (R. pp. 15 and 22) and his examination was confined to such matters as were said to have taken place during the voyage of the "Harry A. Berwind" from Philadelphia to Cardenas, thence to Mobile, and thence on the return trip to Philadelphia. Scott admitted the killing of John S. Coakley, claiming he did it in self-defense, and placed upon Adams, the defendant; Sawyer, the defendant, and Coakley, the dead seaman, the entire responsibility for all the other murders, the witness stating that he (Scott) had no part in any plans or was not in any way concerned in them.

The only witnesses for the defence were the defendants, Sawyer and Adams, both of whom testified that the killing was wholly done by Scott and that they had taken no part whatsoever in it and in fact they testified that Sawyer himself was shot at by Scott. There was nothing in the

testimony in chief relating to any subject prior to the time the schooner, "Harry A. Berwind" left Philadelphia. Adams commenced his testimony from the time he joined the vessel "Berwind" in Philadelphia on July 6, 1905, and covered the ground only from that time to the time he with Sawyer and Scott was brought into Southport, North Carolina, on the schooner "King" in irons. On cross examination the District Attorney propounded to Adams the following question:

"Q. I will ask if within the latter part of the 15 months you were on the schooner 'Benefit' you did not have trouble and tried to create insubordination?" (Alluding to a voyage made by the defendant on the schooner "Benefit" a year or two before he became employed as a sailor on the schooner "Harry A. Berwind").

To which question the defendant, by his counsel, then and there objected, upon the ground that a defendant in a criminal case who has taken the stand and testified in his own behalf could only be cross-examined upon the matters and circumstances about which he had testified to in chief, or upon matters which tended to impeach his character for veracity, and could not be compelled to testify as to other crimes. The objection was overruled and the defendants duly excepted to such ruling. The exception was allowed. The District Attorney then proceeded to ask:

"Q. State what trouble you had on the 'Benefit'?

"A. I was never logged. The only trouble was that the cook gave me molasses to make tea, and I said that was not right, and myself and three other men went to the captain and asked him if he thought it was right. He said they did not have much sugar, and we would have to use molasses; and then I took the tea and threw it overboard and went forward.

"Q. Did you not, from that time on, during that voyage have continuous trouble aboard the 'Benefit'—and even after the captain had explained to you, you went and threw

your tea overboard and then went back and tried to create mutiny?

"A. No, sir; when I was told the second time there was no sugar and we had to use molasses, I said nothing more.

"Q. Did you not go back among the crew and try to create dissatisfaction?

"A. No, sir.

"Q. Did you not go and demand your wack?

"A. After we got out to sea, there were some complaints about our food.

"Q. Did the captain not threaten to put you in irons?

"A. No, sir."

In his argument to the jury the District Attorney, commenting upon the testimony of the defendant Sawyer as to his having gone to get coffee, said "A man under such circumstances who would drink coffee ought to be hung on general principle."

To which remarks by the United States Attorney the defendants, through their counsel at the time objected, having several times interrupted the United States Attorney during his argument to the jury. And before hearing defendants' counsel on the objection, the court remarked, "Mr. Peschau, do you want to cut the District Attorney off from making any argument?"

After which the court asked the District Attorney to confine himself to a proper argument, and the District Attorney expressed his regret if he had made an improper argument, and withdrew the remarks.

To both remarks of the District Attorney, and the comments of the court as made to counsel for the defendants, the defendants then and there objected and asked immediately to be allowed to file an exception. And upon this request to file an exception the Court replied:

"I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

Immediately upon the close of the testimony, the de-

fendants by their counsel filed with the court prayers for instruction, and requested the Court in writing to put the charge in writing. Notwithstanding which the Court proceeded to charge on the law of conspiracy outside of and in addition to the written charge, to which action of the court, before the jury had retired, the defendants noted an objection, and upon the objection being overruled, reserved an exception.

The jury retired and returned a verdict of guilty as to both defendants, whereupon the defendants moved an arrest of judgment and for a new trial, both of which motions were denied, and an exception granted.

This case now comes to this court by writ of error to the Circuit Court of the United States for the Eastern District of North Carolina.

Assignment of Errors.

First. The court erred in overruling defendants' motion in arrest of judgment.

Second. The court erred in permitting the United States attorney to arbitrarily stand certain jurors, without challenge, to the foot of the panel.

Third. The court erred in overruling the defendants' challenge to the array because of the improper method of summoning the special venire.

Fourth. The court erred in permitting the United States attorney to use, in his closing argument, and over the objection of defendants' counsel, improper language prejudicial to the defendants.

Fifth. The court erred in permitting the United States attorney, over the objection of defendants' counsel, to cross-

examine the defendant Adams with reference to his alleged insubordination on the schooner "Benefit".

SIXTH. The court erred in charging the jury that the defendants, Adams and Sawyer, were not charged with murder of Coakley, when the bill of indictment expressly charges them with the murder of Coakley as well as the others, and said charge had not been withdrawn; and this charge of the court tended to prejudice the defendants, because it nullified the effect of the admission of Scott that he alone had killed Coakley.

SEVENTH. The court erred in refusing or neglecting to put the whole charge in writing, although requested so to do, in apt time, by counsel for defendants.

(The above assignment of errors is the same as is contained in the Record at pages 104-105).

POINTS.

I.

While the jury was being empanelled, several jurors were called and as each juror appeared he was told by the District Attorney to stand at the foot of the panel without any challenge on the part of the Government.

At common law, prior to the reign of Edward I, the Government had the right to challenge as many jurors peremptorily as it pleased. This was the cause of great injustice to the defendants, and also caused great delay in the trial of cases. By the Statute of 33, Edward I, this right of peremptory challenge was taken away and the right of the prosecution to challenge jurors was limited to challenges for cause. There then sprang up the privilege of the

prosecution to stand venire men aside and put them at the foot of the panel.

United States *vs.* Marchant, 12 Wheat., 480.
United States *vs.* Shackleford, 18 Howard, 588.
United States *vs.* Douglas, 2 Blatchf. (U. S.) 207.
Seely *vs.* The State, 1 Ga., 213.
Mathis *vs.* The State, 31 Fla., 316.
Rex. *vs.* Parry, 7 Car. & P., 836.
Regg *vs.* Frost, 9 Car. & P., 129-136.
1st Chitty Criminal Law, 534.
Bacon Abr. Tit. Juries, E. 10.

"Originally, by the common law, the crown could challenge peremptorily without limitation as to number. By Act of Parliament passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But, *by a rule of court*, the crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

Hayes *vs.* Missouri, 120 U. S., 68-71.

This practice was followed in this country only in the States of North Carolina, South Carolina and Pennsylvania.

By Section 30 of the Crimes Act of 1790, 1st Statute at Large, 119, persons indicted for treason against the United States were allowed thirty-five peremptory challenges and persons indicted for any other of the offences set forth in said act, for which the punishment is declared therein to be death, were allowed twenty peremptory challenges. At this time the Government was not entitled to any peremptory challenges.

The first case in the United States Courts bearing upon this subject appears to be a case of the United States *vs.* Marchant, 12 Wheat., 480, (decided in January Term, 1827), in which the Court says:

"Until the statute of 33, Edw. I., the crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since the statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, c. 43, ss. 2, 3): 'If the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge, until the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile*, yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the king need show any.' And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times."

This language of the Court is mere *obiter dicta* as the question was in no way involved in the decision of the case.

The next case in the United States Courts bearing on the subject is the case of the United States *vs.* Wilson, 1 Bald., 82, decided in 1830. The following is a quotation from the report of that case:

"The Court observed, that they had known no case where the right now claimed had been allowed to the prosecution; that they would not be the first to do it in a capital case, unless it was clearly established; but that on examining the opinion of the Supreme Court in the Case of United States against Marchant and Colson, 12 Wheat., 480, 484-485, they did not feel themselves at liberty to refuse the

qualified right of challenges now claimed by the United States. The law as laid down by that court is, that in England, the crown had an acknowledged right of peremptory challenges before the Statute of 33, Edw., I., which took them away, and narrowed the right down to those for cause shown; but that a uniform practice had prevailed ever since, down to the present time, to allow a conditional and qualified exercise of that right, if other sufficient jurors remained for the trial, by not compelling the crown to show cause at the time of objection taken out to put aside the juror until the whole panel is gone through, so that it appears there will not be a full jury without the person challenged."

The next case bearing upon this point in the Courts of the United States is the case of United States *vs.* Douglas, 2 Blatchf. (U. S.) 207, decided in 1851. This case was tried before Mr. Justice Samuel Nelson, Associate Justice of the Supreme Court of the United States, and Judge Samuel R. Betts, and Judge Nelson on the authority of the case of the United States *vs.* Marchant, held that the Government had the right to qualified challenge, namely, the right to stand jurors at the foot of the panel. Judge Betts, in a very able dissenting opinion, goes carefully into the law on the subject and shows conclusively that the right of the Government to qualified peremptory challenge did not exist and further states in the dissenting opinion as follows:

"The whole theory of criminal jurisprudence looks to placing the advantage, if one accompanies the case, on the side of the accused; and I think that, after the efforts most universaliy put forth in the United States to strengthen and extend such a privilege, particularly to a person on trial for his life, we are taking a long step backwards, in setting up the practices of the English Assizes, originating in an age of colder sympathy for human life than prevails in our era and in the jurisprudence of the United States. Accordingly, I regard it as far more consonant with the spirit of our institutions and the rules of criminal law sanctioned

by them, for this Court to adhere to the humane and guarded practice adopted in this State, than to recur to one drawn from an English Statute, (by means of a construction wearing more the appearance of maintaining a royal perogative against the will of the legislature, than of securing to a prisoner the pittance of favor accorded by it), which dates back to about the year 1300 to the reign of a Monarch who, in advance of the sentiment of his age, made most meritorious efforts to reform the condition of the law in his realm, both civil and criminal."

The next case in which this point is treated in the United States Courts is the case of the United States *vs.* Shackleford, 18 How., 588, (1855). This case was decided by Mr. Justice Nelson who had also delivered the opinion of the Court in the preceding case. In delivering the opinion of the Court in this case, Mr. Justice Nelson, says:

"The right of challenge in the cases specified in the act of 1790, in respect to the number of jurors, is derived from the common law, which allowed thirty-five in cases of treason, and twenty in cases of felony, 4 Bl. Com., 354-355, 12 Wheat., 483.

"That law also gave the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn.

"The Court is of opinion that the right of challenge by the prisoner recognized by the act of 1790, *does not necessarily draw along with it this qualified right, existing at common law, by the Government;* and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the State law."

Justice Nelson in this opinion expresses a grave doubt whether the right to stand jurors aside exists in the United States Courts.

Up to this time the Statutes of the United States did not give to the Government the right of peremptory challenge in the Courts of the United States.

On the third day of March, 1865, Congress passed the following law:

"That when the offense charged be treason or a capital offense, the defendants shall be entitled to twenty and the United States to five peremptory challenges. On a trial for any other offense, in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the Court without the aid of jurors."

This law, by Act of Congress, June 8, 1872, was amended as follows:

"That when the offense charged be treason or a capital offense, the defendants shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the Court without the aid of triers."

Since these acts have been passed, the question of the right of the prosecution to stand jurors aside has only been considered in one case in the United States Courts so far as counsel for the Plaintiffs in Error have been able to discover and that was the case of the United States *vs.* Butler, 1 Hughes (U. S.) 457, decided in 1877. In that case (in which Chief Justice Waite of this Court, and Judge Hugh L. Bond, were sitting) the right was claimed by the prose-

cution to stand jurors aside without showing cause until the whole panel was exhausted. The report of that case states as follows, at page 467:

"For the prosecution it was contended that the right of qualified challenge in the courts of the United States was sustained by the Supreme Court of the United States in the case of the United States *vs.* Marchant & Colson, 12 Wheat., 480.

"The rule laid down in that case was subsequently followed in the Circuit Court for the Eastern District of Pennsylvania in the case of the United States *vs.* Wilson and Porter, 1 Bald., 78.

"The Court held that this rule was in force when the Government had no right of peremptory challenge but as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing with the defense, and either exercise the right of challenge at once or not at all."

This decision was rendered in the Columbia Circuit of South Carolina where the right of qualified peremptory challenge was recognized in the State practice.

State *vs.* Stevens, 13 S. C., 285.
State *vs.* Barronline, 2 Nott. & M., (S. C.) 553.
State *vs.* Wise, 7 Richl. (S. C.) 412.

In the case of State *vs.* Stevens, 13 S. C., 285, the Court says, however:

"The practice of directing jurors objected to by the State to stand aside until the panel is exhausted has been repeatedly recognized, and is too well established to be disturbed by this Court, *whatever may be our views as to its soundness in principle.*"

But we have seen that notwithstanding that this practice prevailed in the State Courts, Chief Justice Waite and Judge Bond decided that it did not exist in the Courts of the United States.

A case directly in point is the case of Mathias *vs.* The State of Florida, 31 Fla., 291, in which the Supreme Court of the State of Florida reversed a decision of the lower court principally on the authority of the case of the United States *vs.* Butler heretofore cited.

The case of Seely *vs.* State, 1 Ga., 213, is also directly in point and holds that the State having by Statute, been given the right to peremptorily challenge, the right of qualified challenge, which sprang up after the Statute of 33, Edward I, no longer exists. In closing its opinion on this point, at the bottom of page 217, the Court said:

"After mature consultation, then, on this alleged irregularity, *so deeply concerning the purity of trial by jury, and the rights of defendants,* the Court agree that the exception is well founded."

In the case at bar, Judge Purnell sitting in the Court below allowed the prosecution to stand the jurors at the foot of the panel because it was in accordance with the State practice. There can be no question but that in North Carolina the prosecution has this right.

State *vs.* Hensley, 94 N. C., 1021.
State *vs.* Jones, 80 N. C., 415.
State *vs.* Jones, 88 N. C., 671.
State *vs.* Bone, 7 Jones L., 121.

Judge Purnell erred, however, in adopting this practice in the Federal Court. At the time the case of the United States *vs.* Butler was decided, the practice also existed in the State of South Carolina but this practice was not followed by the Federal Court. Further than that, in the case of the United States *vs.* Shackleford, 18 Howard, 588, the Court distinctly says:

"The Court is of opinion that the right of challenge by the prisoner recognized by the act of 1790, does not neces-

sarily draw along with it this qualified right, existing at common law, by the Government; and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, *it should be rejected,* confirming in this respect the practice to the State law."

See also United States *vs.* Devlin, 6 Blatchf., 73
Lewis *vs.* United States, 146 U. S., 370.

It was not contended by the Government in this case that there was any rule in the Circuit Court of the United States for the Eastern District of North Carolina adopting the practice of the State in this particular.

Again in the case of the United States *vs.* Shackleford, the Court says:

"The Court is of opinion that the power conferred upon the Federal Courts to adopt 'rules and regulations for conforming the designation and impanelling of juries to the laws and usages in force at the time in the State,' enables them to adpot the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, *with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.*

"The Section 30 of the crimes act of 1790, 1 Stats. at Large, 119, provides, that if persons indicted for treason against the United States shall challenge peremptorily above the number of thirty-five of the jury, or if persons indicted for any other of the offences before set forth, for which the punishment is declared to be death, shall challenge peremptorily above the number of twenty persons of the jury, the Court in any of these cases shall, notwithstanding, proceed to the trial of the persons so challenging, &c.

"This act of Congress having expressly recognized the right of peremptory challenge in the one case of the number of thirty-five jurors, and in the other of twenty, *they should be regarded as excepted out of the power conferred upon the courts to regulate the subject by rule or order under the aforesaid act of* 1840.

Under this decision, just quoted, the United States having provided by Statute the number of peremptory challenges the Government should be entitled to, the courts are without power to regulate the subject by rule or order so as to adopt the practice in vogue in the State Courts.

Counsel for the Plaintiffs in Error contend that the giving to the Government in this case the right of qualified challenge was a privilege to which it was not by law entitled, which was greatly to the injury of the defendants and which, as is stated in the case of Seely *vs.* Georgia, above referred to, "deeply concerns the purity of a trial by jury and the rights of the defendants".

The Act of Congress provides that in such a case as this the Government shall be entitled to five peremptory challenges. Would it not be error if a judge should allow them six or more such challenges?

It makes no difference whether or not the defendant has exhausted his peremptory challenges. The Government has been given a privilege to which by law it is not entitled. The legislature has determined as between the Government and the prisoner, that it is right and just that the prosecution should have five challenges and the accused twenty. If a judge should allow the Government an extra number of peremptory challenges, is that not, according to the Statute, unjust and illegal?

Justice Betts in the dissenting opinion in the case of the United States *vs.* Douglass, before cited, says as follows:

"Suppose the panel to consist of eighty jurors, (the number returned in the present case), and that it should so chance that one-half of the whole number are men free of impeachment by challenge for the principal cause or favor, yet so circumstanced as to have naturally strong prepossessions in support of the prosecution—for instance, that they are ship-owners, ship-masters and others, so connected with

maritime business as to feel honestly but deeply convinced that every act of a sailor at sea, tending to put in peril the lives of the officers, or the vessel or cargo, should be regarded with the greatest distrust of his motives and as justly requiring, at the hands of the seamen, most satisfactory evidence of his innocence, and that circumstances which, in other relations, would be regarded as slight or insignificant, should carry a weighty import when brought to bear against a sailor. The other half of the panel may be drawn from the ordinary employments of life, and be in no way, by their business, associations, or prepossessions, unfavorably impressed respecting the character and integrity of seamen as a class. On impanelling the jury, the District Attorney may set aside every one of the 40 who would deal dispassionately with the case, and drive the prisoner to exercise his peremptory challenges and those for cause upon the forty who stand naturally in a relation of distrust, if not of hostility, towards him. This, to the extent supposed, is put as an extreme case. But it marks distinctly the principle, and shows that the Government may be enabled to force upon the panel men who, unless constrained by overpowering evidence for the defense, would be ready to refuse the prisoner the benefit of an acquittal under almost any circumstances, and might even be inclined, upon testimony faintly criminating him, to render against him a verdict of conviction."

Suppose a defendant has exhausted all save one or a few of his peremptory challenges. The Government under a claim of right of qualified challenge has from time to time stood to the foot of the panel those who from association and environment would so far as human probabilities go, deal dispassionately with the case. The panel is by no means exhausted. The defendant is tendered a juror, free of impeachment by challenge for principal cause or favor, yet so circumstances as to have naturally strong prepossessions in support of the prosecution. The defendants consult the list of jurors. The remainder of the panel are known to be even more unfavorable to him. He accepts

the juror not because he desires it, but because he is forced to do so or to accept a more unfavorable one. If he makes this selection, does he suffer any the less by the arbitrary action of the Government in forcing him to such an alternation?

Does the fact that driven to the wall, he accepts a juror who may possibly turn out to be fair, rather than exhaust his challenges and be forced to accept a juror he is morally certain could under no conditions be fair—preclude him from seeking and securing relief? The action of the Government is responsible for his extremity, and is he, simply because he grasps the shadow of a hope and refused his own conviction at the outset, is he by such action to be cut off from any relief because his peremptory challenges were not used? Under moral conditions such a course is harmful and a fortiori where public opinion, through newspaper attacks, and the crystallization of public sentiment practically puts the burden of proving his innocence upon the defendant. Such a course is akin to persecution.

II.

The Court permitted the District Attorney to cross-examine Adams, who voluntarily became a witness on his own behalf and for Sawyer, with reference to his own conduct on a previous voyage and on a different vessel and nothing had been said about that matter in the examination in chief.

Counsel for the Plaintiffs in Error submit that this cross-examination was improper and prejudiced the defendant Adams in the minds of the jury as indicating that he was a man of insubordinate disposition on board ship, mutinous, and, therefore, probably guilty of the mutiny and murder wherewith he was charged. The cross-examination referred to, neither questions nor answers, had any relevancy to the examination in chief nor to the case actually on trial.

Nor do we see how it had any tendency to impeach the veracity of the witness. It simply showed that Adams was quarrelsome and insubordinate about his food.

The rule as laid down by this Court in Fitzpatrick *vs.* United States, 178 U. S., 304, is

"When an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statements with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime."

We respectfully insist that this cross-examination had no tendency to connect the defendant Adams with the alleged crime.

In Greenleaf on Evidence, Sec. 445, it is stated:

"The rule is now considered by the Supreme Court of the United States to be well established that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination."

This was distinctly held in the case of R. R. Co. *vs.* Stimpson, 14 Peters, 448.

In People *vs.* Brown, 72 N. Y., 573, it is held that although a person on trial for a criminal case, by taking the stand as a witness, may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his right as a party. His counsel may speak for him while he is a witness and an error of the Court committed against him may inure to his benefit as a party. In that case the Court further says:

"I am of opinion that the cross-examination or persons who are witnesses in their own behalf, when on trial for

criminal offences, should in general be *limited to matters pertinent to the issue, or such as may be proved by other witnesses.*"

We submit that it is clear that if another witness had testified to the exact facts testified to by Adams in his direct examination, such witness could not have properly been subjected to the same cross-examination as the Court permitted in the case of Adams.

We suppose, of course, that the Government would have the right to cross-examine the witness for the purpose of impeaching his testimony in any manner which would legitimately effect his credibility. This seems to be the rule deduced by Mr. Wigmore after a consideration of all the authorities.

Wigmore on Evidence, p. 3154, Sec. 2276 and
p. 3161, Sec. 2277.

See also Allen *vs.* United States, 115 Fed. Rep., 3.

In People *vs.* Crapo, 76 N. Y., 288 it was held that where, in a criminal trial, the accused is offered as a witness in his own behalf, in order to entitle the prosecution to put to him questions which are irrelevant to the issue and calculated to prejudice him with the jury, they must at least be such as clearly go to impeach his general character and his credibility as a witness. The Court in that opinion at page 292 said:

"While the practice has obtained to some extent of allowing questions to the witness, the answers to which would tend to impeach his credibility, the Courts have uniformly excluded questions which do not have that effect."

The cases of People *vs.* Brown, 72 N. Y., 571, and People *vs.* Crapo, 76 N. Y., 288, have been frequently cited with approval by the Court of Appeals of New York.

Van Bokkelen *vs.* Berdell, 130 N. Y., 141.

People *vs.* Patrick, 182 N. Y., 131, 212, Dissenting opinion of O'Brien, J.

It cannot be contended possibly that it would tend in any way to impeach the veracity of Adams as a witness by showing, if it were true, that he was insubordinate or insolent in his coduct on the schooner "Benefit" years before the crime under investigation.

In the case of Buel *vs.* State, 104 Wis., 132, the Court, at page 147, says:

"Text writers and adjudged cases are generally in accord that, so long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness's character, which are irrelevant to the facts in issue, for any other purpose than to effect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within legitimate limits."

See also Baily *vs.* State, 67 Miss., 133.
State *vs.* Carson, 66 Me., 116.
People *vs.* Pinkerton, 78 Mich., 110.
State *vs.* Gotfreedson, 24 Wash., 398.
State *vs.* Hale, 156 Mo., 102.
Saylor *vs.* Commonwealth, 97 Ky., 184.
Nix *vs.* State, (Tex. Crim. App.) 74 S. W., 764.
Thompson on Trials, Sec. 653.
Bullock *vs.* State, 65 N. J. L., 557.
State *vs.* Barker, 68 N. J. L., 19.

The latitude of cross-examination in North Carolina seems to be broader than in most other jurisdictions in America, (State *vs.* Pancoast, 35 L. R. A., 518-519) and yet in State *vs.* Traille, 121 N. C., 674, it is definitely stated that such questions as those which were put to Adams on cross-examination must be confined solely to contradiction or impeachment and are not to affect the guilt or innocence of the accused.

It is error to allow the cross-examination of an accused who has taken the stand in his own behalf which could serve no other purpose than to prejudice him before the jury.

Allen *vs.* United States, 115 Fed. Rep., 3.
Howard *vs.* People, 96 Ill., 492.
Gifford *vs.* People, 83 Ill., 210.
Buel *vs.* State, 104 Wis., 132.
People *vs.* Molineaux, 62 L. R. A., 345-347, notes.

Even if such questions which had been put to Adams on cross-examination were answered in the negative, it is still error to allow the questions to be propounded.

Bates *vs.* State, 60 Ark., 450.
Gale *vs.* People, 26 Mich., 161.
People *vs.* Wells, 100 Cal., 459.

It can hardly be controverted that any other witness would not be allowed to testify as to the matter concerning which Adams was cross-examined.

In Smith *vs.* United States, 161 U. S., 85, on page 90, Mr. Justice Gray in delivering the opinion of this Court said:

"It is, to say the least, doubtful whether evidence of an arrest only, not followed by a conviction, is competent to affect the credibility of a witness. Ryan *vs.* People, 79 N. Y., 593. Van Bokkelen *vs.* Berdell, 130 N. Y., 141."

See also Morrison *vs.* Pettybone, 87 Fed. Rep., 320.

In the case at bar the defendant Adams was not even arrested for any misconduct but the question was intended to prejudice him with the jury by showing, and it was in fact shown, that he had formerly, on a different vessel, quarrelled about his food—the alleged motive for the present crime. It has been distinctly held by this Court that testimony of that kind is improper.

In the case of Boyd *vs.* United States, 142 U. S., 450, Justice Harlan, delivering the opinion of the Court, says on page 458, as follows:

"But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the Government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death Upon careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged."

Again, this Court in the case of Hall *vs.* United States, 150 U. S., 76, says:

"If the defendant had murdered the negro in Mississippi, and had been there convicted therefor, evidence, either of the murder, or of the conviction, would have been incompetent to support the indictment against him for the murder of Yates in Arkansas."

But admitting that such cross-examination would have been relevant simply for the purpose of impeaching the veracity of Adams, we submit that at any rate the Court should have instructed the jury that it was receivable only for that purpose and not having done so it is reversible error although the Court was not requested so to do.

State *vs.* Parker, 134 N. C., 209.

III.

The Court erred in permitting the United States Attorney to use, in his closing argument, and over the objection of defendants' counsel, improper language prejudicial to the defendants.

In his argument to the jury the District Attorney, commenting upon the testimony of the defendant Sawyer as to his having gone to get coffee, said:

"A man under such circumstances who would drink coffee ought to be hung on general principle."

To which remarks by the United States Attorney the defendants through their counsel at the time objected, having several times interrupted the United States Attorney during his argument to the jury. And before hearing defendants' counsel on the subject, the Court remarked:

"Mr. Peschau, do you want to cut the District Attorney off from making any argument?"

After which the Court asked the District Attorney to confine himself to a proper argument, and the District Attorney expressed his regret if he had made an improper argument, and withdrew the remarks.

To both remarks of the District Attorney, and the comments of the Court as made to counsel for the defendants, the defendants then and there objected and asked immedi-

ately to be allowed to file an exception. And upon this request to file an exception the Court replied:

"I will give counsel the benefit of his statement that he has made an exception which the Court considers frivolous." (R. p. 96).

The argument of counsel and remarks of the Court we respectfully submit are in the highest degree improper.

Thompson on Trials, Chap. 30.

We do not suppose that it would require argument to show that the language of the District Attorney was calculated, under the conditions under which these people were tried, to arouse prejudice and inflame the passions of the jury. We respectfully submit that they exceed in bitterness the natural exaggeration often used in the heat of argument and come within the class of remarks frequently condemned by the Courts.

Hall *vs.* West, 150 U. S., 76.
Graves *vs.* West, 150 U. S., 118.
United States *vs.* Williams, 168 U. S., 352.
Hawkins *vs.* United States, 116 Fed. Rep., 569.
State *vs.* Smith, 75 N. C., 306.
Coble *vs.* Coble, 79 N. C., 589.
Perry *vs.* W. N. C. R. R. Co., 128 N. C., 171.

We further submit that the action of the Court and the District Attorney upon objection made by the counsel for the defendants did not remove the prejudice naturally made by such remarks. It is true that the Court asked the District Attorney to confine himself to a proper argument, without saying whether the language was proper or not, and the District Attorney said that he did not want to make an improper argument and withdrew the remarks, but the Court rebuked the counsel for the defendants and strongly intimated that it was his purpose in objecting to

these remarks, not to safe-guard the rights of the defendants, but to prevent the District Attorney making his speech. In addition to that when counsel for defendants asked for an exception to these remarks the Court replied that he would grant an exception which in his opinion was *frivolous!*

"All courts agree that it is the duty of the presiding judge either of his own motion or upon the repuest of the opposing party or his counsel, to interpose and check the party or his counsel in an improper and prejudicial line of argument. * * * * The duty is a very plain one and good care should be taken to discharge it fully and faithfully."

Thompson on Trials, Sec. 958.

We submit that it must appear to the candid mind that the incident was prejudicial to the defendants in that the action of the Court tended to justify the comments of the District Attorney and unjustifiably to disparage counsel for the defendants, and it is to be also noted that the Court did not attempt in his charge to the jury to remove the bad impression thus made.

See Allen *vs.* United States, 115 Fed. Rep., 3.

By this action of the Court in refusing to condemn the language of the District Attorney and to impress on the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the mind of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done."

Wilson *vs.* United States., 149 U. S., 60, 67.

As to what the Court should do under circumstances similar to that in question Thompson on Trials, Sec. 960, says as follows:

"An objection by an opposing counsel, promptly interposed, followed by a rebuke from the Bench and an admonition from the presiding judge to the jury to disregard the prejudicial statement, is generally, though not always, held sufficient to cure the prejudice."

Again, as to what is the duty of the Court in such a situation, this Court, in the case of Hall *vs.* United States, 150 U. S., at page 81, says:

"The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of the crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, *which, upon the defendant's protest, should have been rebuked by the Court, and the jury directed to allow it no weight.*

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error; manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted, entitled him to a new trial."

In the case at bar the Court neither rebuked the District Attorney nor did he direct the jury to attach no weight to the argument. On the other hand he rebuked the defendant's counsel, which undoubtedly tended to prejudice the defendants with the jury.

How different the action of the Court in this case from that of the Court in the following cases:

Dunlop *vs.* United States, 165 U. S., 486.
Wright *vs.* United States, 108 Fed. Rep., 805.
United States *vs.* Alexander, 119 Fed. Rep., 1015.

The action of this Court in this case falls far short of what was done to remove the bad impression created by the language of the District Attorney in the cases last cited.

IV.

The judge refused or failed to put his whole charge in writing although requested so to do at the proper time.

By the Statutes of North Carolina, (Revisal of 1905, Sec. 536) and the decisions of the Court thereon, the law of North Carolina requires the judge to put the whole of his charge on the law in writing when requested so to do.

Dupree *vs.* Insurance Co., 92 N. C., 418.
Jenkins *vs.* Railroad, 110 N. C., 442.
State *vs.* Tyson, 133 N. C., 692.

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